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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-254

A. F. WESTMORELAND,
Petitioner,

vs.

THE STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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STATUTE

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OPINION BELOW

The Opinion of the Mississippi Supreme Court is reported at 246 So.2d 487 and a copy is attached hereto as Appendix I.

JURISDICTION

Petitioner has stated that jurisdiction of this Court to review the Judgment of the Supreme Court of Mississippi in this cause is predicated upon 28 U.S.C.A. 1257 (3). Respondent, State of Mississippi, asserts that appellate jurisdiction is not conferred upon this Court.

STATEMENT

Petitioner, A. F. Westmoreland, has stated in effect in his Petition for Writ of Certiorari that certain constitutional rights that he has been granted have been violated in that the Supreme Court of Mississippi reversed several prior decisions upon which he relied in upholding his conviction. In particular, A. F. Westmoreland's entire argument is predicated upon the theory that the Supreme Court of Mississippi did not follow the doctrine of Stare Decisis. This simply, however, is not the case. In effect, the Supreme Court of Mississippi has never stated that the allegation of ownership in an indictment, with respect to ownership of property, has to be in "*direct words.*" The Mississippi Supreme Court has only stated that there must be a statement as to ownership (*Langford* v. *State*, 123 So.2d 614, at 615), or that the indictment would be dismissed if it failed to charge the ownership of the property (*State* v. *Hubanks*, 99 Miss. 775, 56 So. 163).

Therefore, the basic questions that are before this Court are: (1) Did the decision in the present case by the Mississippi Supreme Court reverse its prior decisions in *Langford, supra*, and *Hubanks, supra*? (2) If the Mississippi Supreme Court did refuse to apply its prior rulings concerning indictments and ownership of property, then does this Court acquire jurisdiction under 28 U.S.C.A. 1257 (3)?

If the answer to *either* one of the two questions presented above is no, then the Petition of A. F. Westmoreland should be denied.

ARGUMENT

I.

The Ruling of the Supreme Court of Mississippi in the Present Case Does Not Reverse Its Decisions in Langford, Supra, or Hubanks, Supra.

Justice Smith of the Mississippi Supreme Court stated in the Opinion in this case that:

> "The requirements of specificity with respect to allegation of ownership demand neither a deraignment of title nor a statement in 'direct terms' showing perfect title where ownership of the money or property obtained reasonably appears from the whole indictment and there is nothing in the indictment to support or suggest any other reasonable conclusion." 246 So.2d at 489, 490.

From a careful reading of the Opinion, it can be seen that the Court for the first time addressed itself to the question of whether "direct terms" were necessary in alleging ownership of property in an indictment.

As stated above, the *Langford* case and the *Hubanks* case neither spoke of an allegation of ownership having to be in "direct terms." These two cases upon which A. F. Westmoreland relied only stated in effect that there has to be a statement as to ownership or a charge of ownership. Neither state that "direct words" are necessary.

Justice Smith, in writing the Opinion in this case (Westmoreland), discusses for the first time whether an allegation of ownership in an indictment requires the use of "direct words" or not. After citing illustrative cases on each side, Justice Smith, in speaking for the Court, concludes:

> "We think the better reasoned view is that the allegations of an indictment for false pretenses, with respect to ownership of the money or property fraudulently obtained, may be sufficient without the use of direct words, where such ownership appears from a reasonable construction of the indictment as a whole." 246 So.2d 491.

It is asserted by Respondent then that the Supreme Court of Mississippi did not in effect reverse the *Langford* decision or the decision in *Hubanks*. In the present case, the Mississippi Supreme Court only discussed if an allegation of ownership required "direct words" when the ownership of the property reasonably appears from reading the indictment as a whole and when there is nothing in the indictment to support or suggest any other conclusion. The Mississippi Supreme Court did not reverse its decisions that the ownership has to be charged as is required in *Langford* and *Hubanks*. The Court only concluded that for an allegation to be specific it does not have to allege ownership in "direct words," when from reading the indictment as a whole no other conclusion can be reasonably drawn.

Thus, what the Court stated was that an indictment has only to *sufficiently charge* ownership and the use of "direct words" is not required.

As to the ownership being sufficiently charged in the present case, Justice Smith stated:

> "After careful consideration of the indictment in the present case we have concluded that in charging that Westmoreland,
>
> > '[W]*ith intent to cheat and defraud the said Peoples Bank and Trust Company,* sell the said conditional sales contract *to the said Peoples Bank and Trust Company,* and did thereby fraudulently *obtain from*

> *the said Peoples Bank and Trust Company,* Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code. * * *
>
> (Emphasis added).'

sufficiently charged ownership by the Peoples Bank and Trust Company of the money obtained." 246 So.2d at 492.

Therefore, the Mississippi Supreme Court in *Hubanks* found that the indictment *failed to charge* ownership. (56 So. at 164.) In *Langford,* the Court stated: "In this case there is no statement at all in the indictment as to the ownership of the property." (123 So.2d at 616.) There the State Supreme Court found that "direct words" are not necessary concerning allegation of ownership and that the indictment *sufficiently charged* ownership when read as a whole.

In conclusion, an indictment still has to allege ownership and the allegation has to be sufficient. The allegation never has required nor does it now require the use of "direct words."

II.

Even If the Mississippi Supreme Court Did Overrule Its Previous Decisions, This Does Not Confer Jurisdiction upon This Court under 28 U.S.C. 1257.

Mr. Justice Brandeis, in speaking for the United States Supreme Court in *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107, stated:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions

on federal questions; *and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.*" (Emphasis added.) 74 L.Ed. at 1113.

The Mississippi Supreme Court in its Opinion in this case addressed itself to the office of an indictment and then stated that "[t]here is, however, a trend away from the unnecessary redundancy and prolixity of former times." (246 So.2d 489.)

In the *Brinkerhoff* case, *supra*, the Court on touching on this point, stated:

"The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the state, it is for them to correct their errors and declare what the law has been as well as what it is. *State courts, like this court, may ordinarily overrule their own decisions without offending constitutional guaranties,* even though parties may have acted to their prejudice on the faith of the earlier decisions." (Emphasis added.) 74 L.Ed. 1114, n. 8.

In *Patterson* v. *Colorado ex Rel. Atty. Gen.*, 27 S.Ct. 556, 205 U.S. 454, 51 L.Ed. 879, Mr. Justice Holmes stated in the majority opinion:

"It is argued that the decisions criticized, and in some degree that in the present case, were contrary to well-settled previous adjudications of the same court, and this allegation is regarded as giving some sort of con-

stitutional right to the plaintiff in error. But while it is true that the United States courts do not always hold themselves bound by state decisions in cases arising before them, that principle has but a limited application to cases brought from the state courts here on writs of error. Except in exceptional cases the grounds on which the circuit courts are held authorized to follow an earlier state decision rather than a later one, or to apply the rules of commercial law as understood by this court rather than those laid down by the local tribunals, are not grounds of constitutional right, but consideration of justice or expediency. There is no constitutional right to have all general propositions of law once adopted remain unchanged. Even if it be true, as the plaintiff in error says, that the supreme court of Colorado departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. It is unnecessary to lay down an absolute rule beyond the possibility of exception. Exceptions have been held to exist. But, in general, the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the 14th Amendment merely because it is wrong or because earlier decisions are reversed." 205 U.S. at 460, 461.

Therefore, it is crystal clear in view of the above cases that there is no constitutional right to have all general propositions of law once adopted remain unchanged.

Concerning the right of Westmoreland to be informed of the charges, the indictment when read as a whole sufficiently charges ownership and there is nothing in the indictment to support or suggest any other reasonable conclusion.

After identifying beyond question the false writing sold to the bank by Petitioner and by means of which, the indictment continues:

> "[T]hat the said A. F. Westmoreland did, *with intent to cheat and defraud the said Peoples Bank and Trust Company,* sell the said conditional sales contract *to the said Peoples Bank and Trust Company,* and did thereby fraudulently *obtain from the said Peoples Bank and Trust Company,* Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code. . . . (Emphasis added)."

This Court stated in *Dunbar* v. *United States,* 156 U.S. 185, 39 L.Ed. 380, that any form of expression may be used which fully and accurately describes the offense and that the entire indictment is to be considered in determining if the offense is fully stated.

From reading the indictment in this case, there can be no question that the Petitioner knew what he was charged with. Further, the sufficiency of an indictment to charge a defendant with the crime of which he was convicted under state law does not present a federal question. *In re Robertson,* 15 S.Ct. 324, 156 U.S. 183, 39 L.Ed. 389. Nor does the misapprehension of the steps which a litigant's best interest require be maintained as grounds for interference by the United States Supreme Court as a denial of constitutional rights. *Market Street Ry. Co.* v. *Railroad Commission of State of California,* 65 S.Ct. 770, 324 U.S. 548, 89 L.Ed. 1171, rehearing denied 65 S.Ct. 1020, 324 U.S. 890, 89 L.Ed. 1438.

CONCLUSION

It is therefore submitted that the Supreme Court did not reverse its prior decisions in upholding Westmoreland's conviction; and even if the State court did reverse the prior decisions, under the authorities as set forth above the Petition should nevertheless be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned of counsel certifies that a true and correct copy of the foregoing Brief of Respondent in Opposition to Petition for Certiorari was this day mailed by United States Airmail, postage prepaid, to the following attorney of record for Petitioner:

Honorable Roy O. Parker
2225 West Main Street
Tupelo, Mississippi 38801
This the 22nd day of December, 1971.

.....

WILLIAM A. ALLAIN
Counsel for Respondent

IN THE SUPREME COURT OF MISSISSIPPI

No. 46,118

A. F. WESTMORELAND

v.

STATE

SMITH, JUSTICE:

A. F. Westmoreland was convicted of the crime of false pretenses in the Circuit Court of Lee County and sentenced to serve a term of 7 years in the penitentiary, of which 2½ years were suspended on good behavior. He appeals from that conviction and sentence.

The indictment on which Westmoreland was tried, omitting the formal part, was as follows:

> [B]eing then and there engaged in the business of selling farm machinery and equipment, feloniously and fraudulently represented to the Peoples Bank and Trust Company, Tupelo, Mississippi, a corporation, that a certain negotiable evidence of debt, to-wit: a conditional sales contract #39227, dated October 19, 1968, and purportedly signed by one D. J. "Doc" Kitchens, for the purchase of one Self-Propelled New Holland Combine, serial #341792, for the amount of $8950 was a valid contract, representing evidence of a bonafide purchase and a sale agreement between the said D. J. "Doc" Kitchens and the said A. F. Westmoreland, the said A. F. Westmoreland then and there well knowing the said conditional sales contract to be a false contract and not representing evidence of a valid purchase and sale transaction between the said A. F. Westmoreland and the said D. J. "Doc" Kitchens, and by virtue of this false representation and false pretense, that the said A. F. Westmoreland did, with intent to cheat and defraud the said Peoples Bank and Trust Company,

> sell the said conditional sales contract to the said Peoples Bank and Trust Company, and did thereby fraudulently obtain from the said Peoples Bank and Trust Company, Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

Neither the sufficiency nor the validity of the indictment was challenged in the trial court by demurrer, motion to quash or otherwise. Moreover, the motion for a new trial, made by Westmoreland following his conviction, did not assign, as a ground therefor, any defect or deficiency in the indictment.

It is now argued, however, that appellant's motion for a directed verdict of not guilty should have been sustained because: (1) The indictment failed to state the ownership of the $8100 obtained from the bank, and (2) the proof was insufficient to show a violation of Mississippi Code 1942 Annotated section 2150 (1956) as alleged in the indictment.

In support of the first of these contentions (that the indictment failed to show ownership of the money), appellant relies on *Langford* v. *State,* 239 Miss. 483, 123 So.2d 614 (1960), and the authorities therein cited.

In *Langford,* the appellant had been indicted for embezzling two cows, and the indictment omitted to state to whom the cows belonged. The Court, in concluding to reverse, said:

> The appellant failed to demur to this indictment but he objected to the testimony as to ownership of the property, moved for a directed verdict and requested

> the Court to peremptorily instruct the jury to find him not guilty. There was also a motion for a new trial, due to the fact that the indictment in this case was void because it did not set out who owned the property alleged to be embezzled. (Id. at 486, 123 So.2d at 616.)

An indictment, of course, constitutes the "pleading" in a criminal case. Its office is to apprise the defendant of the charge against him in fair and intelligible language (1) in order that he may be able to prepare his defense, and (2) the charge must be laid with sufficient particularity of detail that it may form the basis of a plea of former jeopardy in any subsequent proceedings. There is, however, a trend away from the unnecessary redundancy and prolixity of former times.

The requirements of specificity with respect to allegation of ownership demand neither a deraignment of title nor a statement in "direct terms" showing perfect title where ownership of the money or property obtained reasonably appears from the whole indictment and there is nothing in the indictment to support or suggest any other reasonable conclusion.

As stated by this Court in *Neece* v. *State,* 210 So.2d 657, 659 (Miss. 1968), in quoting with approval language used in *State* v. *Dodenhoff,* 88 Miss. 277, 40 So. 641 (1906):

> Preserving to a defendant the right to be duly informed of the nature and cause of the accusation made against him, there ought not to be, in addition to this, insistence upon forms which are purely technical and surplusage. There are too many reversals by far on technical grounds. They ought to be had, in those cases where the defendant is shown by the testimony to be manifestly guilty, only upon objection having real and substantial merit. 88 Miss. at 288, 40 So. at 643.

In the case here, after identifying beyond question the false writing sold to the bank by appellant and by means of which, the indictment charges, he fraudulently obtained from the bank $8100, in money, the indictment continues:

> [T]hat the said A. F. Westmoreland did, *with intent to cheat and defraud the said Peoples Bank and Trust Company,* sell the said conditional sales contract *to the said Peoples Bank and Trust Company,* and did thereby fraudulently *obtain from the said Peoples Bank and Trust Company,* Eight Thousand One Hundred and no/100 Dollars ($8100), good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code. . . . (Emphasis added).

In *Cohen* v. *State,* 101 Ga. App. 23, 27-28, 112 S.E.2d 672, 676 (1960), the Court of Appeals of Georgia, speaking to a contention that an indictment insufficiently set out ownership of funds obtained by false pretenses, said:

> The indictment in this case alleges that "Clarence Orr paid the sum of $2,100" for the worthless stock, "whereby the said Clarence Orr was cheated and defrauded out of the sum of $2,100." This is a sufficient allegation as to the ownership of the money under the authority of Scott v. State, 53 Ga. App. 61, 66, 185 S.E. 131.

In *State* v. *Timmerman,* 88 Utah 487, 488, 55 P.2d 1323, *concurring opinion,* 56 P.2d 1354 (1936), the Utah Supreme Court in discussing the question, said:

> Appellant, however, argued that the information does not state facts sufficient to constitute a public offense. We undertake to dispose of this question, as the same question may arise upon a new trial. The argument is based upon the contention that, in order to state the

offense of obtaining money under false pretenses, the information must affirmatively and specifically allege the ownership of the property, unless there is some legal excuse stated in the indictment or information for omitting the allegation. There is a division of authority upon that question. We need cite only an illustrative case on each side of the controverted question. New Jersey holds squarely in the case of State v. Samaha, 92 N.J. Law, 125, 104 A. 305, 306, that: "'Actual ownership' of the money or goods by the person upon whom the cheat is practiced is not essential. It is sufficient if he had lawful possession and dominion of the same." New Mexico and some other jurisdictions hold that an indictment or information for obtaining money by false pretenses is fatally defective unless the ownership of the property is directly and distinctly alleged. State v. Faggard, 25 N.M. 76, 177 P. 748. In the absence of statute the weight of authority, numerically, is with the rule announced by the case last above cited.

In a number of jurisdictions it is held that it is sufficient if it appears from the indictment or information to whom the property belonged. In the case of People v. Skidmore, 123 Cal. 267, 55 P. 984, the situation was presented of one fraudulently obtaining a signature to a promissory note. It was there held that the facts showed the ownership of the note as fully as though there was a direct allegation in the pleading to that effect. In the instant case it is made to appear from the allegations of the information, although not directly alleged, who the owner of the check was. It is made to appear that the check was the property of the Ostler Candy Company with such certainty that no other implication could possibly arise. We think the information sufficiently alleges ownership, and

being attacked on no other ground, the trial court did not err in admitting evidence over objection that the information did not state facts sufficient to constitute the offense charged.

In *Midgley* v. *State*, 29 Okla. Crim. 108, 232 P. 967 (1925), the Criminal Court of Appeals of Oklahoma, in rejecting a contention that an information charging false pretenses was insufficient because it failed "to allege the ownership" (of the property obtained), said:

> Several assignments of error are presented for the reversal of this case, it being first contended that the amended information on which plaintiff in error was tried is insufficient, in that it fails to allege unequivocally the ownership of the property charged to have been obtained by the false pretenses set out as the basis of the amended information. Numerous authorities are cited to the effect that it is necessary to state to whom the property belonged. The amended information does not in direct terms aver the ownership of the property. This court in the case of Fuller v. Ter., 2 Okl. Cr. 86, 99 P. 1098, upheld an information in practically the same language as the information in this case.
>
> It has been held in other jurisdictions that it is not a fatal defect to fail to allege the ownership in direct terms, if the indictment or information as a whole clearly discloses that fact. State v. Knowlton, 11 Wash. 512, 39 P. 966; Griggs v. U.S., 158 F. 572, 85 C.C.A. 596; State v. Balliet, 63 Kan. 707, 66 P. 1005; People v. Skidmore, 123 Cal. 267, 55 P. 984; State v. Boon, 49 N.C. 463; McClintock v. State, 98 Neb. 158, 152 N.W. 378; People v. Monroe, 64 App. Div. 130, 71 N.Y.S. 803. See, also in this connection

Douglas v. State, 15 Okl. Cr. 648, 179 P. 947; Bennett v. State (Okl. Cr. App.) 204 P. 462.

In *Ireton* v. *State*, 29 Okla. Crim. 266, 272, 233 P. 771, 773 (1925) the Court said in discussing a similar question:

> It appears to us that an allegation that a false pretense is made to a person, and, believing and relying thereon, and by reason thereof, the person to whom the representation is made parts with money is a sufficient allegation as to the ownership. The mere fact that the legal ownership of the money was in some other person who might ultimately have to bear the loss would not be available to the person accused. In the instant case it certainly made no difference to the plaintiff in error whether the money paid over to him on the forged note and mortgage was the property of the First State Bank of Ardmore or of some other person. The transaction is described with sufficient certainty to identify the act, and, if the allegation as to the person injured be erroneous, it is not material, nor does it result in any miscarriage of justice.

We think the better reasoned view is that the allegations of an indictment for false pretenses, with respect to ownership of the money or property fraudulently obtained, may be sufficient without the use of direct words, where such ownership appears from a reasonable construction of the indictment as a whole.

After careful consideration of the indictment in the present case we have concluded that in charging that Westmoreland,

> [W]*ith intent to cheat and defraud the said Peoples Bank and Trust Company,* sell the said conditional sales contract *to the said Peoples Bank and Trust Company,* and did thereby fraudulently *obtain from*

> *the said Peoples Bank and Trust Company,* Eight Thousand One Hundred and no/100 Dollars ($8100) good and lawful money of the United States, in violation of Section 2150 of the Mississippi Code. . . . (Emphasis added).

sufficiently charged ownership by the Peoples Bank and Trust Company of the money obtained.

The second of appellant's contentions involving the indictment is that the proof failed to show a violation of Mississippi Code 1942 Annotated section 2150 (1956), referred to in the indictment, and for that reason he was entitled to a directed verdict of not guilty.

Mississippi Code 1942 Annotated section 2150 (1956) actually is a continuation of and dependent upon, section 2149, which precedes it. Section 2149 defines the crime of false pretenses, and section 2150 merely adds another grade of the same offense for which it provides a more severe penalty when it is committed with the additional elements there enumerated. These sections are as follows:

> Section 2149.
>
> Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding one year, and by fine not exceeding three times the value of the money, property, or thing obtained.

Section 2150.

If the false token by which any money, personal property, or valuable thing shall be obtained, as specified in the last section, be a promissory note, or other negotiable evidence of debt, purporting to have been issued by or under the authority of any person, banking company, or moneyed corporation not in existence, the person convicted of such cheat shall be punished by imprisonment in the penitentiary not exceeding seven years.

In 41 Am. Jur. 2d *Indictments and Informations* section 88 (1968) it is stated:

Although there must be such specification of language as to bring the charge within the particular portion of the statute on which it is based, it has been held not necessary, where the offense is otherwise sufficiently particularized, to specify the exact section of the statute which is alleged to have been violated. In some jurisdictions, there are statutes providing that the statutory provision alleged to have been violated shall be set forth, and it has been held that a statute providing that it shall be sufficient to charge the defendant by using the name and article number of the offense committed is void, *but citation of the wrong statute in an indictment or information will be treated as mere surplusage when objection thereto is first raised on appeal unless it appears that defendant was misled or prejudiced.* (Emphasis added).

In 42 C.J.S. *Indictments and Informations* section 138 (1944), the rule is stated thus:

As a general rule, a misrecital of the statute does not avoid the indictment where the facts stated constitute an offense under any statute, especially where the objection is raised after plea of guilty. The mis-

> recital may be rejected as surplusage, at least where the conclusion is generally as "contrary to the statute in such case made and provided." However, the indictment may be invalidated by a material misrecital of the statute, where reference to the statute must be considered for the purpose of supplying an insufficient description of the offense, and the effect of the erroneous citation is to mislead or fail to inform accused fully and clearly of the charge he has to meet.

In *Harper* v. *United States*, 27 F.2d 77, 79 (8th Cir. 1928), the Court said:

> The statement that the facts violate a certain section of the statute is nothing more than the pleader's conclusion, which may or may not be correct, and neither adds nor detracts from the allegations.

In *White* v. *State*, 169 Miss. 332, 338, 153 So. 387, 388 (1934), in rejecting a contention that an indictment was defective because it contained an incorrect citation of a statute alleged to have been violated, this Court said:

> It is also contended that the indictment is defective because it concludes with the words, "contrary to section 987, Mississippi Code of 1930, and against the peace and dignity of the State of Mississippi." This reference to section 987, Code 1930, is manifestly erroneous, as that section merely provides the penalty that may be imposed upon a conviction for murder. However, this reference to the statute was mere surplusage in the indictment, and the appellant could not have been prejudiced by this erroneous reference thereto. Smith v. State, 58 Miss. 867.

In the case now before us the attention of the trial court was not drawn to this matter in any way. The question was not raised either by demurrer, motion to quash, or in appellant's motion for a new trial made following his

conviction. As in other pleadings, the allegations of fact control as against legal conclusions of the pleader. We have concluded that the indictment in this case sufficiently charged facts which constituted the crime of false pretenses as defined by Mississippi Code 1942 Annotated section 2149 (1956). The proof overwhelmingly supported the charge against appellant, as laid in the indictment. However, it was error to impose sentence under the provisions of Mississippi Code 1942 Annotated section 2150 (1956), since the facts charged in the indictment and shown by the proof do not show that the commission of the offense was accompanied by the circumstances necessary to bring it within that section.

Other matters assigned as error have been examined and considered and are without merit.

The conviction of appellant of the crime of false pretenses (as defined in Mississippi Code 1942 Annotated section 2149 [1956]) is affirmed, the sentence imposed under section 2150 is set aside, and the case is remanded for imposition of sentence as provided by section 2149.

CONVICTION OF APPELLANT OF THE CRIME OF FALSE PRETENSES (AS DEFINED IN MISSISSIPPI CODE 1942 ANNOTATED SECTION 2149 [1956]) AFFIRMED, THE SENTENCE IMPOSED UNDER SECTION 2150 SET ASIDE, AND THE CASE REMANDED FOR IMPOSITION OF SENTENCE AS PROVIDED BY SECTION 2149.

GILLESPIE, P. J., and PATTERSON, INZER and ROBERTSON, JJ., CONCUR.